76-5171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

RICHARD O. KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PHILIP I. PALMER, JR.
2130 First National Bank Bldg.
Dallas, Texas 75202
Counsel For Petitioner

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

SUBJECT INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

RICHARD O. KELLY,

v. *Petitioner,*

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW:

The District Court did not write an opinion.

The opinion of the Court of Appeals is attached to the Appendix and is published in _____ F.2d _____.

JURISDICTION

(i) The original decision of the Court of Appeals was entered July 19, 1976.

(ii) The petition for re-hearing in this case filed by Richard O. Kelly was denied September 13, 1976.

(iii) This Court has jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit by writ of certiorari pursuant to Title 28, U.S.C., Section 1254 (i).

QUESTIONS PRESENTED FOR REVIEW

Were the allegedly false answers of Petitioner sufficiently material to the subject of the Federal Grand Jury investigation so as to constitute perjury?

Should the indictment against Petitioner for perjury have been dismissed in supervision of the conduct of government representatives in the interest of fairness?

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. 18 U.S.C. §1623

(a) Whoever under oath in any proceeding before or ancillary to any Court or Grand Jury of the United States knowing makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

The Grand Jury in Los Angeles was investigating possible mail and wire fraud in connection with the distribution of spurious securities by an entity named The Baptist Foundation of America. Petitioner obtained some of these securities by purchasing and reselling a large boat to one William Cudd,[1] which he used, in turn, to settle various of his own obligations. For a fee, Petitioner had a business associate guarantee payment of these securities, which were in the form of promissory notes, to the seller of the boat.

[1] Mr. Cudd had himself obtained these securities by transferring some allegedly valuable mining claims to the Foundation.

It was, and is, the theory of the prosecution that Petitioner was a knowing participant and co-conspirator with the Foundation and its principals in a massive securities fraud to distribute worthless notes by fraudulent means. The Petitioner, just as vigorously, has steadily denied any participation, connection, or knowledge of the Foundation or its scheme, a factual issue which, regretfully, was never tried.

When the Foundation defaulted in its first interest installment, the seller of the boat began to contact the guarantor. Petitioner then made six telephone calls to the seller in an effort to get him to forego the interest collection. It was the denial of these telephone calls which formed the basis of the perjury indictment.

Petitioner, along with many others, was called before the Grand Jury more than four years after the last of these telephone calls had taken place. The Trial Court below has found that Petitioner was at that time a virtual defendant. Moreover, it was stipulated in this case that every defendant, save only this Petitioner, indicted in the Foundation matter was given a warning by the strike force attorneys that he was a target of the investigations.[2]

Petitioner, along with many others, was indicted for conspiracy and mail fraud in the distributions of the Foundation securities. At the arraignment, Petitioner pled not guilty and filed a written motion for speedy trial. Instead of a speedy trial, some six months later, the first indictment was dismissed after Petitioner was indicted for perjury. This Petitioner never was permitted to have his day in court on the conspiracy and mail fraud charges.[3]

[2] Such a warning is recommended in Section 3.6 (d) of the ABA Standards for criminal justice relating to the prosecution function.

[3] The other two Defendants who refused to plead guilty received the exact same treatment. No one was ever tried in the Foundation Securities matter per se.

It is also worthy of note, that when the trial Court granted Petitioners' motion for acquittal on one of the two original counts, the Prosecutor[4] announced for the record that "it is the Government's intention to re-indict depending on what occurs with the rest of the case."

BASIS FOR ORIGINAL JURISDICTION

Indictment by Federal Grand Jury.

ARGUMENT

A conflict exists between the Circuits on the scope of the word "materiality" as used in the several federal perjury statutes.

Congress has consistently included materiality as an element of perjury, 18 U.S.C. §1001 "a material fact"; 18 U.S.C. §1621 "any material matter"; 18 U.S.C. §1623 "any false material declaration".

The statute here involved is 18 U.S.C. §1623, involving perjury to a Federal Court or Grand Jury; however, materiality as an element here in receiving the same construction as under either the general perjury Statute, 18 U.S.C. §1621, or the false affidavit statute, 18 U.S.C. §1001.

In the 1800's and early 1900's materiality was closely examined and sometimes found not to exist, although no single test was ever ennunciated. *Clayton v. U.S.* (4th Cir. 1922) 284 Fed.537; *Epstein v. U.S.* (2nd Cir. 1921) 271 Fed. 282. Into this setting came the decision of *Carroll v. U.S.* (2d Cir. 1927) 16 F.2d 951. Because it set the test for materiality once universally followed, and still one of the two views, its facts and holding deserve closer analysis.

[4] Who was also the same attorney who had interrogated Petitioner before the Grand Jury.

In the days of prohibition, a celebrity of the times, one Earl Carroll, threw an elaborate party in which the apparent highlight was a nude girl on center stage bathing in a bath tub filled with something. As a direct result of newspaper publicity, Mr. Carroll found himself just four days later in front of a Federal Grand Jury investigating liquor violations. Mr. Carroll stoutly insisted that not only was there no girl, but also that the tub itself held only ginger ale. He next found himself defending six counts of perjury to a grand jury. He was ultimately convicted of two of those counts, both going only to his denials of the girl in the bath tub. The prosecution had, incidentally, not only proved that someone was in the tub but had identified her as a certain Miss Hawley. On appeal, the defendant argued that who, if anyone, was in the bath tub was immaterial to an investigation of possible liquor violations. The contention was rejected since obviously if he had admitted the presence of the girl, and identified her at the time, she could have then testified with some personal knowledge as to whether she was sitting in ginger ale (as defendant insisted) or champagne (as the government suspected).

After this clearly correct holding, the court went on to justify its decision with the now famous language so often quoted:

> "Its investigation and full duty is not performed unless and until every clue has been run down and all witnesses searched for and examined in every proper way to find if a crime has been committed, and to charge the proper person with the commission mission thereof. Its investigation proceeds step by step. A false statement by a witness in any of the steps, though not relevant in an essential sense to the ultimate issues pending before the grand jury may be material, in that it tends to influence or impede the course of the investigation. ***the test of materiality in a Grand Jury's investigation is *whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the*

Grand Jury from pursuing its investigation, and if it does, an indictment for perjury may be predicated upon it." *Carroll v. U.S.* (2d Cir. 1927) 16 F.2d 951, 953.

The italicized language is that which is still widely quoted and followed for the proposition that anything which could have misled the Grand Jury in its investigation is material.[5] *U.S. v. Lardieri* (3d Cir. 1974) 497 F.2d 317 opinion on re-hearing 506 F.2d 319; *U.S. v. Devitt* (7th Cir. 1974) 499 F.2d 135; *U.S. v. Lazarus* (6th Cir. 1973) 480 F2d 1180; *U.S. v. Tyrone* (9th Cir. 1971) 451 F.2d 16.

The other view requires that the prosecution demonstrate not just that the false testimony could conceivably have the tendency to have impeded the Grand Jury, but that a truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum, further fruitful investigation would have occurred. *U.S. v. Lasater* (8th Cir. 1976) 535 F.2d 1041; *U.S. v. Beer* (5th Cir. 1975) 518 F.2d 168; *U.S. v. Birrell* (2d Cir. 1972) 470 F.2d 113; *U.S. v. Freedman* (2d Cir. 1971) 445 F.2d 1220.

These two views have been succinctly termed, by the Second Circuit as the "could have" and the "would have" test. This Circuit also concedes that there are decisions within its own circuit going each way, the resolution of which it currently left as an "open question." *U.S. v. Doulin* (2d Cir. 1976) 538 F.2d 467, 470, footnote 3.

The facts of the Carroll case demonstrate that it satisfied materiality under either test, while the language was broader than the merits required. The difficulty with the broad language is that,

---

[5] Materiality in a court trial is tested differently; the capacity to influence the trier of fact upon the issues before it. *U.S. v. Edwards* (8th Cir. 1971) 443 F.2d 1286.

taken literally, there is virtually nothing which could ever be held immaterial. This conflicts, however, with the intent manifested by Congress in each of these statutes that materiality is a meaningful element of the crime. To be sure, no lie on any subject is to be condoned, but perjury is regarded as a most heinous crime drawing quite severe punishment. Should not the Congressional intent be enforced so as to draw a distinction somewhere between those lies which frustrate the heart of the inquiry and those misstatements on matters only at the outermost periphery?

At present, there remains a conflict which should be resolved by this Court. Without detailing the merits of the Kelly case, it may fairly be stated that the alleged misstatement was of the outer-edge category, with the prosecution unable to show any manner in which a truthful answer would have furthered the investigation. The Ninth Circuit, in the opinion below, expressly declined to follow the Eighth Circuit view. Consequently, the Petitioner stands convicted by geographical happenstance.

A conflict exists between the Circuits on the right of federal prosecutors to interrogate unwarned target defendants for no reason beyond eliciting possible perjurious testimony.

The Second Circuit has recently decided a case strikingly similar to the present case in which it reached a result directly opposite. *U.S. v. Jacobs* (2d Cir. 1976) 531 F.2d 87. If anything, the case *sub judice* may present a somewhat stronger case of unfairness, for Defendant Jacobs was at least indicted for the principal crime along with the perjury count so that she was to be allowed her day in court on all charges. Petitioner here seemingly was indicted as an afterthought when he persisted in maintaining his innocence and demanding his right of trial.

The Second Circuit decision was rendered while *U.S. v. Mandujano* _____ U.S. _____ 48 L.Ed.2d 212 96 S. Ct. _____ (1976) was under consideration by this Court. Nothing said in the opinion however conflicts in any way with the *Mandujano* decision, but to the contrary, the Second concurred that even a target has the obligation to appear before a Grand Jury. Additionally, it did not reach the issues of self-incrimination or any alleged due process violations, but instead bottomed its opinion on "fairness" and its supervisory powers over the administration of criminal justice. Had this Petitioner been indicted in the Second Circuit, rather than in the Ninth, his Motion to Dismiss would apparently have been granted.

The issue, of course, is just how far prosecutors should be permitted to go in using later perjury indictments to batter reluctant defendants into submission so as to avoid trials of earlier but more complicated charges.

A perjury indictment is really not that difficult to obtain by any zealous prosecutor; indeed, it would be a rare individual who could provide a precise and accurate recollection of events occurring more than four years ago.[6] To be sure, those events would be apt to stay in a man's memory if he were then knowingly engaged in some criminal activity, but that sine qua non will not be tried.

Petitioner believes this possibility of abuse and misuse is not only strongly presented in his case, but is what has led to such decisions as that of the Fifth Circuit in *Mandujano* and many other authorities cited by Mr. Justice Brennan in his concurring

[6] Thus here, the seller of the boat himself recalled only those three of the six telephone calls upon which he had made contemporaneous notes, and stoutly denied the other three telephone calls (all person to person) established by Petitioner's telephone bills. No one, however, suggests that the seller also committed perjury.

opinion. The majority, speaking through Mr. Chief Justice Burger, seem to leave this question open, first with the quotation from the opinion in *U.S. v. Orta* (5th Cir. 1958) 233 F.2d 312 to the effect that the only debatable issue is the one of supervision over the conduct of government representatives in the interests of fairness, and then second, by holding that this Court agrees with that view.

Having done so, the questions remain as to just what limits are to be set by these interests of fairness. It is already apparent that if the Circuits are left to fashion their own limits, the situation soon will be a disparity of results, which this Court must eventually resolve.

PRAYER

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

By:_____

Philip I. Palmer, Jr.
2130 First National Bank Bldg.
Dallas, Texas 75202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

RICHARD O. KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

All parties required to be served with copies of the Petition for Writ of Certiorari have been served. Three copies of the Petition for Writ of Certiorari were served upon the Solicitor General by depositing same in a United States Mail Box, with air mail postage prepaid address to Solicitor General, Department of Justice, Washington, D. C. 20530, on the ____th day of October, 1976. Three copies of the Petition for Writ of Certiorari were served upon the United States Attorney by depositing same in a United States Mail Box, with air mail postage prepaid addressed to Vincent J. Marella, Esq., 312 North Spring Street, Los Angeles, California 90012, on the ____th day of October, 1976.

Philip I. Palmer, Jr.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	No. 74-1535
	)	
v.	)	
	)	
RICHARD O. KELLY,	)	**ORDER**
	)	
Appellant.	)	

Before: TRASK and GOODWIN, CIRCUIT Judges,
and ENRIGHT,* District Judge.

The order filed August 1, 1975, vacating the submission of the above-entitled case is hereby vacated; the case stands submitted.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	No. 74-1535
	)	
v.	)	
	)	
RICHARD O. KELLY,	)	**OPINION**
	)	
Appellant.	)	

[July 19, 1976]

Appeal from the United States District Court
for the Central District of California

Before: TRASK and GOODWIN, CIRCUIT Judges,
and ENRIGHT,* District Judge.

GOODWIN, Circuit Judge:

Richard O. Kelly appeals from a conviction on one count of perjury.[1] We affirm.

In February, 1968, Kelly was introduced to William J. Cudd, who appeared to be a man of means. Cudd represented that he possessed considerable wealth in the form of promissory notes issued by the Baptist Foundation of America. Cudd told Kelly he wished to buy a yacht, using some of the promissory notes as

---

*The Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

[1] The trial court granted a motion for acquittal directed to a second count of the perjury indictment.

[2] There is some ambiguity in the testimony regarding the initiation of contact with Powell. Powell testified that Kelly made the initial contact while Kelly stated he did not recall how contact was made.

purchase money. Kelly set out to acquire a yacht for Cudd on some basis that would be profitable to Kelly. Kelly associated Dan Manning in the venture. Either Manning or Kelly[2] contacted James Powell, a salesman employed by the Kona Marina in San Diego. Powell eventually located Ralph Kappler, an Oregon resident, who agreed to sell his yacht, the Gannett, II, for $330,000 in BFA notes. Under the agreement, the sale was to be made to Manning's wholly owned corporation, M-K Enterprises. Kelly's plan was that M-K Enterprises would convey the yacht to him and he would convey it at a profit to Cudd. The initial seller, Kappler, was not made aware of the involvement of either Kelly or Cudd in the transaction.

After the agreement was reached, Kelly informed Cudd that he had located a suitable vessel. Kelly stated that the purchase price would be $560,000 in BFA notes plus $55,000 in cash. Kelly intended to use the cash to pay Powell's brokerage commission and to compensate Manning for guaranteeing payment of the BFA notes to be issued Kappler. Kelly intended to keep the remaining price difference, $230,000 in BFA notes, as his profit.

Cudd agreed to the transaction and delivered $560,000 in notes to Kelly. Manning then used $300,000 in BFA notes and a personal note for $30,000[3] to pay Kappler the purchase price. Kelly's name did not appear on the chain of title to the notes, which ran from Cudd directly to M-K Enterprises.[4] Title to the boat was transferred to M-K Enterprises. Kelly used the excess $230,000 in BFA notes, his profit, to settle various claims.

[3] Manning's personal note for $30,000 was later exchanged for a $30,000 BFA note.

[4] The notes were apparently rewritten after the Cudd-to-Kelly transfer to eliminate reference to Kelly in the chain of title.

In September, 1968, the interest came due on the notes held by Kappler. When the interest was not paid, Kappler called Manning and demanded payment. Manning made repeated assurances, but the payment was not forthcoming. Then, on February 10, 1969, Kelly called Kappler. Kappler was away from his phone, but returned the call from his architect's office. In this call, Kelly told Kappler that he, Kelly, was associated with the Baptist Foundation and that he would be meeting with the Foundation the next day regarding payment of the interest. On February 11, 1969, Kelly again called Kappler and requested that he voluntarily reset the interest date back six months. Kelly further stated that if Kappler would reset the interest dates, Kelly would see that the Foundation paid the principal and interest from then on as they became due. Kappler asked for time to think over the request. When Kelly called again on the evening of February 11, he told Kappler that if Kappler would reset the interest date then the overdue interest would be paid when the notes matured. When Kappler refused, Kelly told him that the interest had already been paid to a Bill Cudd.

Four years later, on February 16, 1973, Kelly was called before a federal grand jury investigating possible violations of federal laws resulting from the negotiation of worthless BFA notes. He testified in part that he had not had any direct dealings with Kappler and, more particularly, that he had not telephoned Kappler on February 11, 1969, to ask him to reset the interest dates on the BFA notes.[5] Kelly was subsequently indicted under 18 U.S.C. § 1623 for perjury. After a nonjury trial, Kelly was convicted on one count of the indictment.

[5] Kelly testified as follows:

"Q. Isn't it a fact that in April 1968 Cudd gave you a $650,000 Baptist Foundation promissory note?

I. *Lack of Target or* Miranda *Warnings*

Kelly contends that the grand jury testimony should have been suppressed because he was not given a Miranda warning or advised that he was a possible target of the grand jury investigation.

Kelly was adequately advised of his Fifth Amendment rights.[6]

fn. 5 continued

A. No.
A. No, sir.
No, sir.
Q. How much did he give you?
A. I don't remember the date, but the total amount of notes was $560,000.
Q. All right, sir. And then you used $330,000 worth of those notes to purchase the GANNETT?
A. That's right.
Q. And that was from a man by the name of Ralph Kappler?
A. I did not have any dealings with Mr. Kappler. Mr. Manning, as I told you before, and his broker in San Diego made the transaction with Mr. Kappler."

* * *

"Q. Did you ever have any conversations with Mr. Kappler?
A. No, sir.
Q. You never did?
A. No.
Q. Did you ever have any conversations with Mr. Kappler's representative?
A. No.
Q. Isn't it a fact, sir, on February 11, 1969, you telephoned Mr. Kappler and requested that he voluntarily reset the date on the Baptist Foundation notes to September 1, 1968?
A. Me? Absolutely not.
Q. Thereby eliminating the interest which was then due on the note?
A. Absolutely not.
Q. Thereby eliminating the interest which was then due on the note?
A. Absolutely not.
Q. Are you certain of that, sir?
A. I'm as certain as I can be. I mean, to my knowledge I have never talked to the man in my life."

[6] Before testifying before the grand jury, the appellant was warned as follows:
"Q. Mr. Kelly, you have been subpoenaed before this Grand Jury because it believes that you have information which may be of assistance to it with respect to an inquiry that it's conducting now. That investigation involves among other things violations of the Federal Mail and Wire Fraud Statutes, in addition to other possible violations. Do you understand that?

His appearance before the grand jury was not a custodial interrogation. A full *Miranda* or target warning was not required, *United States v. Mandujano*, _____ U.S. _____ (May 19, 1976); *Gollaher v. United States*, 419 F.2d 520, 523-24 (9th Cir. 1969).[7]

II. *Materiality*

Kelly contends that his telephone calls to Kappler were insufficient material to support a conviction. The test for materiality in perjury prosecutions was set forth by this court in

fn. 6 continued

A. Yes, I do.
Q. Now, sir, before I or any of the Grand Jurors ask you any more questions, I would like to inform you as to what your rights and responsibilities are with respect to your testimony today before the Federal Grand Jury.
First, you have an absolute constitutional right to refuse to answer any question which you honestly believe may tend to incriminate you. Do you understand that?
A. Yes.
Q. Second, while you do not have the right to have an attorney present in the Grand Jury room, if you do feel the need of assistance of counsel during the course of any questions that are asked you, make that need known to the Grand Jury foreman, who is sitting to your left, and I'm sure he will allow you to leave the Grand Jury room and consult with counsel.
Are you represented by an attorney today?
A. No, I'm not.
Q. Now, sir, if you do so decide to answer any question that is put forth to you, you are under an absolute obligation to answer each such question completely and truthfully. Do you understand that?
A. Yes.
Q. In the event that you do not answer such a question truthfully and completely, you may subject yourself to the penalties of perjury. Do you understand that?
A. Uh-huh.
Q. Do you have any questions concerning your rights and/or responsibilities before this Grand Jury?
A. No."

[7] *United States v. Mandujano*, _____ I.S. _____ (May 19, 1976), *reversing United States v. Mandujano*, 496 F.2d 1050 (5th Cir. 1974), also casts doubt upon some of the language in *United States v. Wong*, No. 74-1636 (9th Cir., Sept. 23, 1974), *cert. granted*, _____ U.S. _____ (June 1, 1976), which was inconsistent with *Gollaher v. United States*, 419 F.2d 520 (9th Cir. 1969).

United States v. Lococo, 450 F.2d 1196, 1199 (9th Cir. 1971).[8] Under the *Lococo* test, the government need not show that the false testimony actually impeded the grand jury investigation or that it related to the primary subject of the investigation. It is sufficient for the government to prove that the testimony was relevant to any issue under consideration by the grand jury. If the falsity of the testimony would have the natural tendency to influence the grand jury's investigation, it is material. 450 F.2d at 1199.[9] Here, one of the subjects of the grand jury's investigation was the extent of Kelly's involvement in the negotiation of BFA notes. By testifying falsely, he withheld from the grand jury direct evidence of the extent of his personal involvement. The testimony was thus material.

III. *Actual Falsity*

Kelly contends that the evidence was insufficient to show the actual falsity of the statements made to the grand jury. Kappler testified at trial that he received three telephone calls from Kelly. However, Kappler had no recollection of two other calls which Kelly's telephone bills indicate were placed to Kappler's architect's phone.[11]

The bare telephone records are insufficient to show the actual falsity of Kelly's testimony denying the calls which Kappler did

[8] *Lococo* was decided under 18 U.S.C. § 1621, but neither party suggests that the standard of materiality applicable to perjury prosecutions under)h 1623 differs from that applicable to § 1621 prosecutions.

[9] After this case was submitted, Kelly called our attention to *United States v. Lasater*, _____ F.2d _____ (8th Cir. 1976) (decided May 17, 1976). To the extent that *Lasater* advocates a more restrictive view of materiality in perjury prosecutions than does *Lococo*, we prefer the rationale of the *Lococo* case.

[10] The two calls were shown as made on January 23, 1969, and February 5, 1969.

[11] This call was shown as made on February 3, 1969.

not remember. *United States v. Laughlin*, 226 F. Supp. 112, 113 (D.D.C. 1964). Nor does Kelly's in-court stipulation that five telephone calls were made between his *telephone* and Kappler's *telephone* obviate the necessity for proof of a conversation between Kappler and Kelly. But Kappler testified from present recollection as to three of the six calls. The trier of facts was obviously convinced on the basis of this evidence that Kelly's statements to the grand jury were false. Kappler's testimony was at least partially corroborated by the telephone bills,[12] and we cannot say that the trial judge's determination of actual falsity was clearly erroneous. *Bush v. United States*, 267 F.2d 483, 485 (9th Cir. 1959).

IV. *Knowing Falsity*

Kelly contends that the evidence is insufficient to show that he knew the statements he made to the grand jury were false.

An accused can be convicted of perjury under § 1623 only if his statement to the grand jury was knowingly false. 18 U.S.C. § 1623(a). Actual knowledge of falsity ordinarily must be inferred from circumstantial evidence. *United States v. Sweig*, 441 F.2d 114, 117 (2d Cir. 1971); *Gebhard v. United States*, 422 F.2d 281, 287-88 (9th Cir. 1970).

Viewing the facts in the light most favorable to the government, *United States v. Magana*, 453 F.2d 414, 415 (9th Cir. 1972), the court's finding that Kelly's testimony was knowingly false must be sustained. The trier of facts could properly conclude that the

[12] There was corroboration with respect to the three phone calls on February 10th and February 11th, since these calls appeared on Kelly's phone records. Kappler's failure to recollect the other three calls does not necessarily imply faulty recollection on his part since the calls could have been received by another party, even though two are shown as person-to-person calls. *See United States v. Laughlin*, 226 F. Supp. 112, 113 (D.D.C. 1964).

testimony was actually false. His conclusion that Kelly had a motive to lie was equally correct: By denying the phone calls, Kelly concealed from the grand jury the extent of his personal involvement in the BFA scheme.

Finally, the record contains evidence of the subjective importance of the telephone calls to Kelly. At one point he was asked if he had an interest in keeping Kappler calm. Kelly admitted that he did, but he denied remembering the calls.[13] Kelly now contends that the subjective importance of the calls was minimal since the deal had already closed. This contention, directly contrary to the admission made at trial, is nonsense.

Kelly argues strenuously that the four-year period between the telephone calls and his appearance before the grand jury ought to preclude a perjury conviction. The span of time over which an accused has allegedly retained memory of an event is indeed relevant to the issue of knowing falsity and was taken into account by the trial judge here. But we cannot say that any particular lapse of time will immunize a witness from the consequences of lying. If the evidence is sufficient to show that the

[13] The appellant testified as follows:

"THE COURT: Why were you concerned about Kappler?

THE WITNESS: I wasn't concerned about Kappler, your Honor, but I am still in the boat transaction where Cudd is refusing to pay the interest, or at least he is telling me that he is refusing to let the Foundation pay the interest until the boat is delivered to him. And Manning on the other side is saying, 'I am not going to give him the boat until he gives me the $50,000.'

THE COURT: You wanted to keep Kappler calm—

THE WITNESS: I would have been happy to keep Kalpler calm. I think the logical thing for me to do would have been to call Kappler. And I see nothing wrong with me talking to Mr. Kappler. If I had remembered it I would have said I remembered it.

THE COURT: Because if Kappler hadn't kept calm it could have screwed the whole deal up?

THE WITNESS: My $230,000 would be gone.

THE COURT: So you had an interest in keeping Kappler calm?

THE WITNESS: Yes, sir."

accused actually remembered the event, then a perjury conviction must be sustained, regardless of the length of the time separating event and testimony.

V. *Motion for New Trial*

Kelly contends that the trial court committed reversible error in overruling his motion for a new trial. The motion was made on the basis of new polygraph evidence. Without reaching the issue of the admissibility of such evidence, we hold that the trial court did not abuse its discretion in denying the motion. *United States v. Craft*, 421 F.2d 693, 695 (9th Cir. 1970). The polygraph examination could have been administered prior to trial. Thus, the appellant failed to exercise the requisite diligence in adducing the polygraph evidence. *See Fernandez v. United States*, 329 F.2d 899, 904 (9th Cir. 1964).

The judgment of conviction is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	No. 74-1535
	)	
v.	)	
	)	
RICHARD O. KELLY,	)	**ORDER**
	)	
Appellant.	)	

Appeal from the United States District Court for the Central District of California

Before: TRASK and GOODWIN, CIRCUIT Judges, and ENRIGHT, District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Trask and Goodwin have voted to reject the suggestion for a rehearing en banc, and Judge Enright recommended that it be rejected.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P.35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

* The Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	No. 74-1535
	)	
v.	)	
	)	
RICHARD O. KELLY,	)	**DC #CR-13462 HP**
	)	
Defendant-Appellant.	)	

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Philip I. Palmer, Jr., Esp. counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before October 13, 1976.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ ALFRED T. GOODWIN
United States Circuit Judge.

DATED: SAN FRANCISCO, CALIF.

No. 76-517

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD O. KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

ROBERT H. PLAXICO,
PAUL J. BRYSH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD O. KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-3 to A-11) is reported at 540 F. 2d 990.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1976. A petition for rehearing with a suggestion of rehearing *en banc* was denied on September 13, 1976. The petition for a writ of certiorari was filed on October 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's false statements before the grand jury were material to its investigation.

2. Whether petitioner's grand jury testimony should have been suppressed because he was not told when he

appeared to testify that he was a target of the grand jury's investigation.

STATEMENT

Following a nonjury trial in the United States District Court for the Central District of California, petitioner was convicted of perjury before a grand jury, in violation of 18 U.S.C. 1623.[1] He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A-3 to A-11).

The facts are set forth fully in the opinion of the court of appeals (Pet. App. A-3 to A-5). They show, in brief, that petitioner was a middleman regarding the sale by Ralph Kappler of a yacht and its ultimate purchase by William J. Cudd for $560,000 in promissory notes issued by the Baptist Foundation of America (BFA). When interest on the promissory notes held by Kappler was not paid, petitioner telephoned Kappler, said he was affiliated with BFA, and asked that Kappler push back the interest-due date. When Kappler refused, petitioner told him that the interest had been paid to Cudd.

Petitioner was subsequently called to testify before a federal grand jury investigating possible violations of federal law by petitioner and others resulting from the negotiation of worthless BFA promissory notes. He denied that he had telephoned Kappler or that he had requested Kappler to adjust the interest date on the BFA notes. This false testimony formed the basis of his perjury conviction.

---

[1]Petitioner was indicted on two counts of perjury. The district court granted petitioner's motion for judgment of acquittal on the other count (Pet. App. A-3 n. 1).

ARGUMENT

1. Petitioner argues that the courts of appeals are in conflict over the standard of materiality and that under a standard more favorable to him than that utilized by the court below his false statements before the grand jury were not material.

The well-settled test of materiality in grand jury testimony, as originally set forth in *Carroll* v. *United States,* 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763, is "whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation * * *." See also *United States* v. *Devitt,* 499 F. 2d 135, 139 (C.A. 7), certiorari denied, 421 U.S. 975; *United States* v. *Lardieri,* 497 F. 2d 317, 319 (C.A. 3); *United States* v. *Percell,* 526 F. 2d 189, 190 (C.A. 9). Petitioner's false testimony was material under this standard. As the court of appeals noted, "one of the subjects of the grand jury's investigation was the extent of [petitioner's] involvement in the negotiation of BFA notes" (Pet. App. A-8). By denying that he had ever spoken to Kappler about the subject, petitioner "withheld from the grand jury direct evidence of the extent of his personal involvement" (*ibid.*).

Petitioner claims that other courts require a showing that, but for the untruthful testimony, further fruitful investigation by the grand jury would in fact have occurred. Two cases petitioner cites (Pet. 6), however, follow the traditional *Carroll* standard. See *United States* v. *Lasater,* 535 F. 2d 1041, 1047-1048 (C.A. 8), and *United States* v. *Beer,* 518 F. 2d 168, 171-172 (C.A. 5).[2] See also *United States* v. *Whimpy,* 531 F. 2d 768, 770 (C.A. 5).

---

[2]In *Lasater,* the district court had found that the false testimony did not "tend to influence, mislead or hamper the grand jury in its investigation * * *" (535 F. 2d at 1046). Citing *Carroll,* the court of

United States v. *Birrell,* 470 F. 2d 113, 115 n. 1 (C.A. 2), and *United States* v. *Freedman,* 445 F. 2d 1220, 1226-1227 (C.A. 2), do contain language suggesting that the government must show that further investigation would in fact have occurred. In *Freedman,* however, a case involving false testimony before the Securities and Exchange Commission, the court cited *Carroll* approvingly (see 445 F. 2d at 1226). *Birrell* involved a false statement in an affidavit in support of a motion for leave to proceed *in forma pauperis* and for the appointment of counsel. The statement was held to be material, but it is by no means clear that the court believed that a correct answer would in fact have led to further inquiry into the defendant's financial status (see 470 F. 2d at 115 n. 1).

Even assuming that the language from these decisions states a test that is significantly different from the one applied by the court below, it would be of no avail to petitioner since his false testimony, interfering with the grand jury's investigation of his connection with BFA, was material under either the "could have" or "would have" formulation. Moreover, neither *Freedman* nor *Birrell* involved grand jury testimony, and the Second Circuit has stated that for that reason they may be distinguishable from cases such as the present one. *United States* v. *Doulin,* 538 F. 2d 466, 470 n. 3, certiorari denied, No. 76-25, October 18, 1976; see *United States* v. *Mancuso,* 485 F. 2d 275, 281 n. 17. Since the Second Circuit has not yet crystalized its views, there is no conflict among the circuits warranting this Court's review.

---

appeals upheld this finding (535 F. 2d at 1047-1048). In *Beer*, a case involving a false statement by a bank officer in a Federal Deposit Insurance Corporation questionnaire, the court stated that materiality turns upon whether a statement "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made" (518 F. 2d at 171).

2. Petitioner also contends that his perjurious testimony should have been suppressed because he did not receive a "target" warning before testifying before the grand jury. This claim is forclosed by *United States* v. *Mandujano,* No. 74-754, decided May 19, 1976, which held that a witness cannot justify giving false testimony by the claim that the government improperly questioned him.

Petitioner asserts, however, that the decision below conflicts with *United States* v. *Jacobs,* 531 F. 2d 87, in which the Second Circuit, ruling not under the Constitution but in the exercise of its supervisory function, suppressed perjurious testimony on the ground that the defendant's failure to receive a target warning departed from the practice usually followed by federal prosecutors in the Second Circuit and created what in the court's view was an intolerable lack of uniformity. But in *Jacobs* this Court, on the government's petition for a writ of certiorari, vacated the judgment of the court of appeals and remanded for reconsideration in light of *United States* v. *Mandujano, supra* (No. 75-1883, order entered November 1, 1976).

To the extent that petitioner claims that the government's conduct in this case was somehow unfair (see Pet. 8-9), the facts here are in all relevant respects the same as those in *Mandujano.*[3] All of the participating Justices in that case agreed, not only that the privilege against compelled self-incrimination provides no protection for

---

[3]Prior to being questioned, petitioner was told that the grand jury believed that he had information concerning its inquiry into violations of federal mail and wire fraud statutes, "in addition to other possible violations" (Pet. App. A-6 to A-7 n. 6). He was also informed of his right to refuse to answer incriminating questions and he was told that he could consult an attorney outside the courtroom. Finally, he was reminded of his obligation to respond truthfully to any question he answered, and warned that false testimony could result in perjury charges (*ibid.*).

the crime of perjury, but also that the government's conduct had not deprived the defendant of due process.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

ROBERT H. PLAXICO,
PAUL J. BRYSH,
Attorneys.

DECEMBER 1976.

---

[4]Plurality opinion, p. 12; concurring opinion of Mr. Justice Brennan, p. 1; concurring opinion of Mr. Justice Stewart, p. 1.

There is no reason to hold this petition pending the decision in *United States* v. *Washington*, No. 74-1106, certiorari granted June 1, 1976, or in *United States* v. *Wong*, No. 74-635, certiorari granted June 1, 1976. *Washington* presents the different issue of whether the government's failure to give a "target" warning bars the use of the witnesses' grand jury testimony in a subsequent prosecution, not for perjury, but for the substantive offense that was the subject of the grand jury investigation. *Wong* does involve a perjury prosecution; we have argued in our brief in that case that it is controlled by *United States* v. *Mandujano*. In any event, the only respect in which *Wong* differs from *Mandujano*—Wong did not understand the warnings regarding the privilege that were given; Mandujano did—would not avail petitioner, since there is no suggestion here that he did not understand the warnings regarding the privilege that he received.

We are sending petitioner's counsel a copy of our briefs in *Wong* and *Washington*.